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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. .....

Al C. Hightower ..... *Petitioner*

Vs.

State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS AND APPENDICES

The petitioner, Al C. Hightower, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas which affirmed his conviction of inducing an abortion in violation of Ark. Statutes.

CITATIONS TO OPINIONS BELOW

The majority opinion of the Arkansas Supreme Court has been reproduced at Appendix A, infra, p. 7, and is reported in Advance Reports No. 13 (9-8-75) Vol. 258 Ark. Rpts.

Rehearing was denied October 6, 1975. (R. 259)

JURISDICTION

The majority opinion of the Arkansas Supreme Court was delivered on September 8, 1975. (R. 250)

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(3). The time in which to file this Petition for Writ of Certiorari is January 4, 1976.

QUESTION PRESENTED

Whether the Arkansas abortion statutes can be employed to prosecute a layman for the crime of inducing an abortion where those statutes except from criminality only a life-saving procedure on behalf of the mother without regard to the stage of pregnancy or recognition of other involved interests and make no distinction between lay persons and medical doctors. Stated again, whether the Arkansas abortion statute is unconstitutional on its face.

Statutory and Constitutional Provisions Involved

1. The case involves Section One of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 41-303, Arkansas Statutes Annotated (1947). The entire chapter governing abortion, Arkansas Statutes Annotated, Sections 41-303 — 41-310 is reproduced at Appendix B, Infra, p. 17.

STATEMENT

The petitioner, a layman, was indicted for the offense of inducing an abortion. The woman involved was Paula Temple. It was charged that Hightower had committed the crime on November 29, 1973. The jury returned its verdict finding petitioner guilty, and fixed his punishment at a $1,000 fine and three years imprisonment. (R. 30 & 31) When the abortion was performed, Paula Temple was well into her pregnancy.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Well in advance of trial, petitioner filed a Motion to Dismiss which contended inter alia:

> "The Arkansas abortion statute and the section thereof as set forth in the Information, is unconstitutional . . . The Statute is violative of the Constitution of the United States, particularly Sec. 1 of the 14th Amendment — the statute is vague, unreasonable, and deprives a female of her individual right to determine if she should bare a child, and the right to select whom she pleases to do the abortion upon her. Furthermore, the State of Arkansas has no constitutional right whatsoever to interfere with a pregnant woman who desires an abortion." (R. 11)

On appeal the Arkansas Supreme Court held the statute to be constitutional.

REASONS FOR GRANTING THE WRIT

This case involves a substantial question which affects an

important constitutional right that was resolved by the Arkansas Supreme Court contrary to the decisions of ***Roe*** v. ***Wade***, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) and ***Doe*** v. ***Bolton***, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201.

The same statutory scheme which was condemned and diluted in ***Roe*** and ***Doe*** presently prevents women in Arkansas as it prevented Paula Temple from procuring legitimate medical service in a properly equipped and staffed hospital or clinic. The abortion was performed on Paula at her request.

The thrust of the opinion of the Arkansas Supreme Court, which is artificially prolonging the life of Arkansas' abortion laws, was that Hightower had no standing to challenge the very laws under which he stood convicted and sentenced to a three-year term of imprisonment and a fine of $1,000.00. In view of the circumstances, it is difficult to imagine one who has a greater interest or a better standing than petitioner to test the constitutionality of the Arkansas abortion statutes.

There is, even at this time, a conflict among the courts of the several states as to the status of the respective abortion statutes.

In ***State*** v. ***Hultgren***, 204 N.W. 2d 199, decided on February 2, 1973, it was recognized that a layman convicted of abortion could successfully challenge the constitutionality of the abortion statutes of Minnesota even though that issue had not been raised in the trial court. See also ***State*** v. ***Hodgson***, 204 N.W. 2d 199 (Minn. 1973) ***State*** v. ***Munson***, 206 N.W. 2d 434 (S.D. April 5, 1973) ***People*** v. ***Frey*** and ***People*** v. ***Mirmelli***, 294 N.E. 2d 257 (Ill. March 20, 1973) ***People*** v. ***Bell***, 294 N.E. 2d 711 (Ill. April 2, 1973); ***State*** v. ***Strae***, 509 P. 2d 1217

(N.M. February 9, 1973); *Commonwealth v. Page*, 301 A. 2d 215 (Pa. March 29, 1973).

Another unfortunate result of the decision of the Arkansas Supreme Court is that women who are desirous and, under the rule announced in *Doe* and *Roe*, are eligible for abortions must still submit themselves to perhaps dangerous circumstances, the unskilled, travel to another jurisdiction, or accept the unwanted child.

It is apparent that neither the Supreme Court of Arkansas nor those charged with the obligation of instituting criminal prosecutions in Arkansas intend to comply with the declarations of *Doe* and *Roe*.

CONCLUSION

Certiorari should be granted in order to settle and clarify the status of the abortion laws of Arkansas. They are violative of the U.S. Constitution on their face.

Respectfully submitted,

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APPENDIX A

Supreme Court of Arkansas
No. CR 75-61
Opinion delivered September 8, 1975

Al C. Hightower, Appellant, vs. State of Arkansas, Appellee.

Appeal from Pulaski Circuit Court, Fourth Division, Richard B. Adkisson, Judge; affirmed.

J. Fred Jones, Justice

The appellant, Al C. Hightower, was convicted of performing an abortion in violation of Ark. Stat. Ann. §41-303 (Supp. 1973) and sentenced to three years in the penitentiary. Section 41-303 provides as follows:

> "It shall be unlawful for anyone to administer or prescribe any medicine or drugs to any woman with child, with the intent to produce an abortion, or premature delivery of any foetus before or after the period of quickening, or to produce or attempt to produce such abortion by any other means; and any person offending against the provisions of this Section shall be fined in any sum not to exceed one thousand dollars ($1,000.00), and imprisoned in the penitentiary not less than (1) nor more than five [5] years."

Subsequent sections set out the circumstances and procedures under which a *legal* abortion may be performed by a licensed medical doctor, and §41-307 provides that legal abortions may be performed only in an accredited hospital.

The facts in the case at bar are not in dispute. The appellant Hightower was a layman with no medical training

and the evidence is to the effect that he was in the business of performing abortions in his home for a standard fee of $500. The prosecuting witness was a 19 year old college student and was approximately four months pregnant at the time she contacted Mr. Hightower in regard to abortion. Mr. Hightower interviewed her in the kitchen and bedroom of his home and advised her that a "D & C" abortion was very dangerous but that a "cotton pack" was a very safe procedure, and that his charge for an abortion was $500 to be paid in advance.

The prosecuting witness said she borrowed the $500, gave it to Mr. Hightower, and that he packed her womb with cotton or gauze, together with a plastic-type tube of some kind, and told her to return to him if she had any difficulty. She later developed temperature and was admitted to St. Vincent Infirmary where she was found to be badly infected and where the foreign matter was removed and the fetus was aborted.

On appeal to this court Mr. Hightower relies on the following points for reversal:

> "The trial court erred in denying defendant's motion to dismiss and quash information.
>
> The Arkansas abortion statute is unconstitutional and void on its face.
>
> The trial court committed numerous reversible errors in the process of selecting the trial jury.
>
> The trial court erred in refusing to grant a mistrial in the case, as repeatedly requested by defendant.

> The trial court erred in refusing and denying defendant's request for a directed verdict."

In support of his first, second and fifth points, the appellant argues that the abortion statute, §41-301, et seq. (Repl. 1964 and Supp. 1973) is unconstitutional in the light of the United States Supreme Court decisions of ***Doe*** v. ***Bolton***, 410 U.S. 179 (1973), and ***Roe*** v. ***Wade***, 410 U.S. 113 (1973). We rejected this argument in ***May*** v. ***State***, 254 Ark. 194, 492 S.W. 2d 888 (1973), and in that case we said:

> "The appellant has no standing to personally attack the constitutionality of §41-303 because it is not unconstitutional as applied to him. As applied to appellant, §41-303 simply prohibits a layman from performing or inducing an abortion. As we have pointed out, the United States Supreme Court says in ***Doe*** and ***Roe*** that the states have a right to prohibit such activity by one other than a physician. In ***Brunelle, supra***, the standing of the accused to attack the statute as unconstitutional was brought into question and his standing to make that attack was denied because Brunelle was not a licensed physician. The court said: 'Only persons whose interests are affected by a statute may assert that it is unconstitutional'."

The appellant next contends that the trial court committed reversible error in the process of selecting the trial jury. He argues that the trial court erred in refusing to allow his counsel to orally examine each prospective juror individually and at length, but rather requiring his counsel to refer to questionnaires filled out and sworn to by the prospective jurors pertaining to their qualifications as jurors. The trial court's method of selecting the jury and the appellant's objections thereto are set out in the record as follows:

"MR. COFFELT: All right. Now then, with reference to the jury proposition, the — I am familiar with the procedure that this Court follows in these cases and, that is, you furnish a list of the jurors with a typewritten resume of their background. There are close to forty jurors listed that is available now for the trial of this case with that list. I want to, rather than to stumble through those files, I want to ask each juror, I don't know, I don't think I know but one juror I can recall personally. I want to ask each juror his name and address, his family connections, and to ascertain his general background, undertaking to qualify them to try this case. It's impossible for me to remember what is said in those interrogatories which they have signed as the jurors is called. No lawyer could retain, unless he knew the jurors, in his mind what they put on that requirement that they have signed. Now, in addition to that, a lawyer gets out there and stumbles around a fooling through that list and trying to find their number, he could ask these questions a whole lot sooner than he could by being required to look up in that great, long list, and that's the procedure I'd like to follow, and I request it be followed in the case in the questions that I be permitted to ask. Now, in addition to that, the defendant demands a full panel drawn jury, that twenty-four qualified jurors to try this case be placed in the box, that they be called out one at a time, and examined one at a time, and accepted and rejected one at a time as we go along, rather than the procedure, which I understand that you intend to follow of calling twelve jurors at once and placed in the box and go from there. Then, in addition to that, in qualifying this jury, if I exhaust the eight challenges that was given to me by the statute, or that was given to the defendant by statute, that before I make that exhaustion, if there has been one juror tentatively accepted, and I do not wish to accept any juror permanently until they are finally sworn in to try this case, then I would like to have the privilege of going

back and excusing a juror at any time prior to the exhausting of my eight challenges.

THE COURT: All right. Number one, the questionnaires that are available, you will find in front of you at the counsel table filled out by each juror and they set out certain general information, such as the name, address, occupation, marital status, number of children, occupation of spouse, if any, and these questionnaires have the juror number which is available on the list of jurors which you also have or will be on the desk, on the counsel table in front of you. The juror's name will be called, along with the number, and the position in the box is in sequence, one through twelve on the, one through six on the top row, and seven through twelve on the bottom row, therefore, each juror is easily identified from where they sit in the box. The reference by juror number in the lower righthand corner of the questionnaire is instantaneous, merely flip the page. The questionnaires are in numerical order and that will be made a part of the record in this case. I feel that the jurors should not be required to answer general questions every time they come up for trial that are available to the attorneys, not only at the trial but at any time the attorney has a trial, attorney has a trial in this Court, they may review questionnaires that are always available and your motion in that respect is overruled. As far as the objection of excusing from the box or the Court procedure of failure to allow the attorneys to excuse from the box after the jurors have been finally accepted by the State and passed to the defense and either accepted or rejected, it is overruled."

The appellant relies on *Bradford* v. *Checker Cab Co.*, 247 Ark. 84, 444 S.W. 2d 684 (1969), in support of his argument, but the *Bradford* case is not in point with the case at bar. The *Bradford* case turned on lack of notice, which is not

applicable to the case at bar. In *Bradford* we said:

> "We recognize that the trial court here was attempting to expedite the litigation in his court and that in this endeavor he should be encouraged. However, reluctantly, we find that under the record here, in view of the short notice to counsel of the new jurors called in the evening before, that he abused his discretion in refusing counsel an opportunity to examine the jurors individually. In so holding, however, we do not intimate that a trial court in a civil case must permit counsel to ask the same question of twenty-four jurors."

In *Bradford* we also stated: (Quoting from *Tatum* v. *Rester*, 241 Ark. 1059, 412 S.W. 2d 393 [1967]).

> "It has long been recognized in this State that 'litigants in civil cases, as well as in criminal cases, have the right to examine the jurors separately in order to determine whether such jurors are subject to challenge for cause, or to elicit information on which to base the right of peremptory challenge, subject of course to the ***right of the court to control the extent of such examination, acting in its sound discretion***'."

This quote goes back through *Hogg* v. *Darden*, 237 Ark. 478, 374 S.W. 2d 184; *Mo. Pac. Transp. Co.* v. *Johnson*, 197 Ark. 1129, 126 S.W. 2d 931, to *Baldwin* v. *Hunnicutt*, 192 Ark. 441, 93 S.W. 2d 131, with the above emphasis first added in *Tatum, supra*. See also 11 Ark. Law Rev. p. 117, article by Honorable R.A. Leflar entitled "The Criminal Procedure Reforms of 1939 — Twenty Years After."

In the case at bar the appellant's attorney was familiar with the procedure adopted by the trial court pertaining to the questions, and he had access to the questionnaires for at least two days prior to the trial. Furthermore, the appellant's attorney was given unrestricted latitude in questioning the prospective jurors as to their qualifications not already answered in the questionnaires. We find no abuse of discretion in the use of the questionnaires.

The appellant argues that the court committed error in selecting the jury in that the appellant was denied a "full panel" of 24 jurors in the "jury box." The record is somewhat confusing in failing to distinguish between the "jury box" from which the names were drawn and the "jury box" in which the jury was to sit. The record does not indicate there were fewer than 24 names in the "jury box" from which the petit jury was drawn; the appellant's attorney indicated there was close to 40, and the trial court said there was 32. In any event the number to be placed in the box was within the discretion of the trial judge. See Ark. Stat. Ann. §39-209 (Supp. 1973).

The trial judge first examined the jury panel as to qualifications, after which he proceeded as follows:

> "We'll call the name of twelve prospective jurors. As your name is called, please take your seat in the jury box in the order in which your name is called, the first juror will be seated in the upper, left corner of the box through six on the top row, the seventh juror in the lower left corner of the box through twelve on the bottom row."

The trial court then announced: "Let the record reflect that thirty-two prospective jurors are in the box, and are to be drawn

by the Clerk." The clerk was then directed to draw 12 names from the box, announcing the names followed by a number. The appellant's counsel then questioned the jurors, both collectively and individually, as to their qualifications to sit as jurors in the case at bar. Following this procedure, the state excused two jurors peremptorily and the defendant's attorney excused three. The record then appears as follows:

"THE COURT: Are the remaining jurors satisfactory, Mr. Coffelt?

MR. COFFELT: For the time being, Your Honor; yes sir.

THE COURT: Subject to your previous objection.

MR. COFFELT: Yes, sir.

THE COURT: Call five additional jurors. As your name is called, please stand behind the rail, in the order in which your name is called, in a line from my left to right."

The five additional jurors were then questioned first by the state and then by the defense, after which the court questioned the jurors and excused two. Two other jurors were then called and the additional five were again examined by the state and by the defense. The state accepted these jurors and the defense excused four ot them, whereupon four additional jurors were called and at this point, out of hearing of the jury, the record reflects as follows:

"MR. COFFELT: Your Honor, at this time the defendant has exhausted seven of his eight challenges, and I desire . . . to now challenge Mr. John Calaway, who is seated in the box.

THE COURT: Did you understand the Court's ruling prior to accepting the jurors in the box that there would be no excuses from the box?

MR. COFFELT: I understood that, Your Honor, and I saved my exceptions to it.

THE COURT: Well, I just wanted to make sure you understood. Denied."

The defense counsel then renewed his request to peremptorily challenge juror Calaway who had been seated as a juror and when this was again denied by the court, he then moved to strike Mrs. Kampbell who had also just been seated. The record at this point is as follows:

"MR. COFFELT: (Interposing) Mrs. Kampbell was temporarily accepted. She is seated in the box.

THE COURT: She was accepted, subject to the objection, with the understanding that there would be no excuses from the box.

MR. COFFELT: That is what the ruling of the Court was.

THE COURT: Yes, sir. You understood that?

MR. COFFELT: Yes, I understood that."

The defense then exhausted its eighth peremptory challenge by excusing a Mrs. Graham who had not been seated as a juror. One additional juror was then called. He was examined by the state and the defense and seated as the twelfth

juror. We find no merit in the appellant's contention that the trial court erred in not permitting him to exercise his eighth peremptory challenge on a juror who had been examined by all parties and already seated as a juror. See ***Jeffries*** v. ***State,*** 255 Ark. 501, 501 S.W. 2d 600; ***Jones*** v. ***State,*** 166 Ark. 290, 265 S.W. 974, and the cases there cited.

As to appellant's fourth point, in questioning the prospective jurors, the state's attorney asked a question as follows:

> "And let me ask you, finally, well, have any of you all ever been involved personally with any of the political campaigns run by Mr. Coffelt —"

At this point the attorney for the appellant interposed objection on the basis that politics had no place in a lawsuit and moved for a mistrial. The trial court denied the motion then interposed the following comment and question to the jury:

> "I don't believe that question is necessary. Do any of you, are any of you prejudiced for or against any of the attorneys in this case to the extent that you wouldn't be able to give this defendant a fair and impartial trial? I'll take by your silence that you are not. Go ahead."

The prosecuting attorney then stated that he had no intention of injecting politics into the matter but only intended his question to determine whether any members of the jury were acquainted with the appellant's counsel.

We are of the opinion that the trial court did not err in refusing appellant's motion for a mistrial. We are of the opinion the appellant was not prejudiced by this rather awkwardly

worded question by the state's attorney, especially in the light of the court's comment and question to the jurors, and in light of the state attorney's explanation of what he intended.

The judgment is affirmed. (R. 250)

Rehearing Denied by Supreme Court of Arkansas on October 6, 1975. (R. 259)

APPENDIX B

"41-303. Unlawful to induce abortion by use of medicine or drugs or by any other means — Penalty — It shall be unlawful for anyone to administer or prescribe any medicine or drugs to any woman with child, with the intent to produce an abortion, or premature delivery of any foetus before or after the period of quickening, or to produce or attempt to produce such abortion by any other means; and any person offending against the provisions of this Section shall be fined in any sum not to exceed one thousand dollars ($1,000.00), and imprisoned in the penitentiary not less than (1) nor more than five (5) years."

"41-304. Conditions which make abortion legal. — Notwithstanding any of the provisions of Section 1 [§41-303] of this Act [§§41-303 — 41-310] it shall not be unlawful to advise, procure, or cause the miscarriage of a pregnant woman or an abortion when the same is performed by a doctor of medicine licensed to practice medicine in Arkansas by the Arkansas State Medical Board, if he can reasonably establish that:

There is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the said woman, or

There is substantial risk that the child would be born with grave physical or mental defect, or

The pregnancy resulted from rape or incest which was reported to the Prosecuting Attorney, or his deputy within seven (7) days after the alleged rape or incestuous act. The Prosecuting Attorney shall submit a written report of said complaint to the doctor and said report to be made a permanent part of patient's medical records."

"41-305. Consent required for legal abortion. — No legal abortion may be performed until the pregnant woman has given written consent for said abortion to be performed, and if the said woman shall be a minor or incompetent as adjudicated by any court of competent jurisdiction then only after permission is given in writing by the parents, or if married, her husband, guardian or person or persons standing in loco parentis to said minor or incompetent."

"41-306. Residence requirement for legal abortion — Exception. — No legal abortion shall be performed unless the pregnant woman shall have resided in the State of Arkansas for a period of at least four (4) months immediately preceding the operation being performed except in the case of emergency where the life of the said woman is in danger."

"41-307. Restriction on where legal abortions may be performed. — Legal abortions may be performed only in a hospital licensed by the Arkansas State Board of Health and accredited by the Joint Commission of Accreditation of Hospitals."

"41-308. Filing of certificate justifying abortion prior to performance. — Before any legal abortion shall be performed by a

doctor of medicine there must be filed with the hospital where said abortion is to be performed the certificate of three (3) doctors of medicine not engaged jointly in private practice, one (1) of whom shall be the person performing the abortion, which certificate shall state that said doctors of medicine have examined said woman and certify in writing the circumstances which they believe justify the abortion."

"41-310. Immunity from civil liability of persons who refuse to participate in or perform abortions. — (a) No person shall be required to perform or participate in medical procedures which result in the termination of pregnancy; and the refusal of any person to perform or participate in these medical procedures shall not be a basis for civil liability to any person nor a basis for any disciplinary or any other recriminatory action against him.

(b) No hospital, hospital director or governing board shall be required to permit the termination of human pregnancies within its institution and the refusal to permit such procedures shall not be grounds for civil liability to any person nor a basis for any disciplinary or other recriminatory action against it by the state or any person.

(c) The refusal of any person to submit to an abortion or to give consent therefor shall not be grounds for loss of any privileges or immunities to which such person would otherwise be entitled nor shall submission to an abortion or the granting of consent therefor be a condition precedent to the receipt of any public benefits."